

The Value Of a Trial

By Andrew Cockburn

There is a depressing possibility that the verdict of posterity on the Westmoreland trial will be that these complex issues do not belong in a courtroom. Such an opinion ignores the tremendous contribution made by the judicial process to understanding events that might otherwise remain cloaked in secrecy.

It is of course true that the threat of court action should not be used merely as a device to deter people from investigating possibly nefarious activities by prominent citizens and organizations. Nevertheless, whatever the motives of those who pursue such suits, there is much to be said for dragging contentious matters such as the Vietnam War in front of a judge.

The function of the courts is, after all, to arrive at the truth. They have

considerable power to compel the production of all relevant evidence. Witnesses are enjoined to stick to the truth on pain of punishment for perjury. Those who are unwilling to testify can be forced to do so and to produce documentary evidence that might otherwise remain hidden. The only other forum for pursuing such thorough investigation is the quasi-judicial process of a Congressional committee armed with subpoena power.

The ordinary journalist or historian researching a story that powerful people would rather were left untold is comparatively powerless. Witnesses can lie their heads off or simply refuse to talk. A subject who wishes to cut off an unwelcome line of questioning can hardly be restrained from leaving by physical force. Jour-

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nalistic interrogators, even the most famous, are not necessarily as skilled in their craft as aggressive, well-trained lawyers.

It fact, many of the revelations communicated in recent years by journalistic investigators were actually garnered by a court or a Congressional committee. The press earned a towering reputation during the Watergate investigations, but most of its information was first revealed in Judge John J. Sirica's courtroom and Senator Sam Irvin's committee. The Watergate burglar James W. McCord broke the affair wide open only under the judge's threat of a long stretch in jail. It was the committee investigators who discovered the existence of the White House tapes, and the Special Prosecutors who forced President Richard M. Nixon to disgorge their contents. In much the same way, many of the learned studies of America's entry into World War II are based largely on the proceedings of the postwar Congressional inquiry into Pearl Harbor.

It may well be that the subject of the Westmoreland trial — the actions of the United States command in Vietnam — should be the subject of another Congressional inquiry. The original CBS documentary was by comparison an inadequate substitute. Despite the extensive evidence assembled and presented, that journalistic investigation was necessarily incomplete, dependent as it was on cajolery to get important participants to appear and testify truthfully about events within their ken.

A full-scale Congressional inquiry on the subject is now unlikely, however, and we should all be grateful for the deep pockets of both CBS and the General's backers: together, they have given history a fairly thorough rendering, in documentary and sworn evidence, of the mechanics of the campaign in Vietnam. Some of this material had already been presented on television, but, as we know, many people did not consider it authoritative. Presented a second time through the more rigorous processes of the courtroom, it is now unassailable.

Other evidence, which might not otherwise have been revealed for a very long time, if ever, was brought into the light of day in court. Former Secretary of Defense, Robert S. McNamara, for example, who has fended off all entreaties from journalists and historians to explain his role in the Vietnam War, had no option but to give a lengthy deposition and hours

of testimony on the subject. Hitherto secret documents — including high-level exchanges between Saigon and Washington — and other classified material of great historical interest are now on the public record.

It is natural for journalists to fear the courts and the potentially "chilling" effects of libel suits. But they should recognize that as an investigative instrument the courts are indispensable in forcing historical truth into the public record. The CBS-Westmoreland lawsuit has proved this once again. □

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The Westmoreland Case: A Broken West Point Tie

J By M.A. FARBBER

Gen. William C. Westmoreland's decision to settle his libel suit against CBS last week was prompted, according to his friends, by his demoralization over damaging testimony of his former aides and his feeling that, however right he was, he was in a "no-win situation."

The general knew from pretrial depositions how witnesses were likely to testify. Nevertheless, his friends said, he was so shaken by the willingness of his former intelligence chief in Vietnam to "break the old West Point tie" and take the stand against him that he was open to a proposed agreement that bore a close resemblance to an offer made by CBS a year ago.

The proposal in February 1984, nine months before the trial began, said, as did last week's joint statement, said that both sides believed their positions had been "placed before the public" that CBS recognized General Westmoreland's service to his country, and the general respected the rights of journalists to present views "contrary to his own."

The 1984 statement said that General Westmoreland "believes that the broadcast was prejudicial in concept an execution"; the agreement reached last week does not. The 1984 proposal said that CBS News "stands by the accuracy and fairness of its broadcast." In the final agreement, this language was reserved for a separate statement by CBS.

Although the settlement seemed sudden, there lies behind it a three-year-old story of failed efforts to resolve a case that eventually required 18 weeks of trial and cost the litigants millions of dollars and an enormous toll in energy and anguish.

General's Camp Divides

On Monday, when the end came, both sides laid a claim to victory, but while CBS officials and their lawyers were privately toasting one another with Champagne and diet soda and dancing at Regine's discothèque, General Westmoreland's camp was bitterly divided over whether the general could have obtained a better outcome — either earlier from CBS, or, later, from the jury.

CBS stressed that General Westmoreland had received neither money nor an apology, and that the network stood by the 1982 documentary on the Vietnam War that was the subject of the suit. The documentary had charged a conspiracy by the general's command in 1967 to show progress in the war by understating the size of the enemy.

General Westmoreland, who commanded United States forces in Vietnam from 1964 to 1968, underscored a passage in the joint statement that said the network respected his "long and faithful service to his country and never intended to assert, and does not believe," that he "was unpatriotic or disloyal in performing his duties as he saw them."

Statement Was Enough

"If that statement had been made after the CBS program was aired, it would have satisfied me," the 70-year-old general declared at a news conference Monday, standing beside Dan M. Burt, his chief attorney. Indeed, General Westmoreland said, had that statement been issued at any time since the broadcast on Jan. 23, 1982, "it would have ended the episode."

To prevail in his suit, the general had to prove not only that the broadcast — "The Uncounted Enemy: A Vietnam Deception" was false but also that CBS knew it was false or acted with reckless disregard for its truth or falsity. The first issue was called the "truth" issue; the second, the "state of mind" issue.

In recent weeks, as CBS put on a series of military witnesses, the general had become overwhelmingly concerned with losing on the "truth" issue. He worried that the jury would be unable to distinguish what had actually happened in Vietnam in 1967 from what some witnesses simply recalled they had told CBS during the preparation of the program.

"If the jury had found against Westmoreland on truth, the trauma of defeat would have been too much," Jay Schulman, a political scientist who was one of Mr. Burt's closest advisers on the case, said in an interview. "That was the fulcrum concern."

Mr. Schulman said that General Westmoreland was "running profoundly scared" of the testimony for CBS this month by his former aides in Saigon, not so much because of what they would tell the jury but because their very appearance on the stand undermined him.

General Westmoreland's former intelligence chief, Maj. Gen. Joseph A. McChristian, testified Feb. 6 that General Westmoreland had acted improperly and for "political" reasons on one occasion. Until that moment, Mr. Schulman said, "Westmoreland didn't believe he would appear."

"It was a perplexing thing to me to see someone like McChristian testifying," General Westmoreland acknowledged last week. He told friends that the trial had come to "look like a no-win situation."

Mr. Burt, who is president of the conservative, Washington-based Capital Legal Foundation, which supported the general's suit, shared his client's growing pessimism and was under other pressures as well. Having spent more than \$3 million, he was \$500,000 in debt on the case and, with each day, his expenses mounted. The trial had also disrupted his family life. While he was living in a New York hotel, his third wife, in Washington with a year-old daughter, was trying to complete a doctoral dissertation in linguistics.

Meanwhile, CBS had become increasingly confident of winning the "state of mind" element of a jury verdict — making it impossible for General Westmoreland to receive an award.

But lawyers for the network were concerned about the public relations impact of losing on the "truth" issue — just as Time magazine had suffered from the loss on that issue in the libel suit brought by former Israeli Defense Minister Ariel Sharon — and they had other reasons for preferring to settle.

"If Westmoreland was ready to drop the suit on the right terms, it was in some ways better than winning a jury verdict," said a CBS lawyer who asked not to be identified. "Westmoreland could always attack a verdict that went against him. This, he couldn't. Besides, CBS simply had to respond to his offer — it couldn't be seen as trying to pursue an old man and drive a stake in his heart."

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CBS Offers Follow-Up Program

Following a controversy over "The Uncounted Enemy" in the months after its broadcast, CBS proposed airing a 45-minute follow-up discussion program, with an additional 15 minutes for General Westmoreland to state his views. The general, however, demanded a published apology, a "full re-

traction" on the air that met his approval and "was not less than 45 minutes in duration," and some payment. He also sought access to a CBS internal investigation of "The Uncounted Enemy" conducted by a senior producer, Burton Benjamin. The report criticized some aspects of the documentary's preparation.

On Sept. 13, 1982, General Westmoreland, who lives in South Carolina, filed suit there. "There is no way left," he said, "for me to clear my name, my honor and the honor of the military."

Besides CBS, the suit named George Crile, the producer of the documentary; Mike Wallace, its narrator, and Samuel A. Adams, a former Central Intelligence Agency analyst whose was a paid consultant for the broadcast.

Trial Is Moved

The first overtures toward settling the suit were made in October, 1982, when CBS asked its local counsel in South Carolina to talk the matter over with a nephew of General Westmoreland's who was a lawyer. The talks got nowhere, although the they were briefly resumed when, in November 1982, CBS won a motion to change the locale of the trial from South Carolina to New York.

Around the same time, Paul Thompson, a retired general who had been an editor at Reader's Digest, attempted to mediate for General Westmoreland. As a result of General Thompson's intervention, Mr. Burt said, he met in November 1982 at the Sky Club atop the Pan Am Building with George Vradenburg 3d, CBS's general counsel.

"I said, 'Give us an apology and lots of money' — lots of money being only a negotiating ploy," Mr. Burt recalled. "Vradenburg said no."

Frank Stanton, the former president of CBS, also tried to arrange a settlement during that period. But when General Westmoreland insisted on an apology, a monetary payment and free air time, without a rebuttal by CBS, the network concluded that a middle ground could not be found.

Half Hour of Air Time

Yet another attempt to settle the case in the fall of 1982 was made by retired Gen. Maxwell Taylor, who was approached by Roswell L. Gilpatric, a CBS board member who was Deputy Secretary of Defense under President John F. Kennedy. Mr. Gilpatric proposed a half hour of air time for General Westmoreland, coupled with a statement by CBS that it never intended to impugn the general's patriotism. The offer was rejected.

In the spring of 1983, the judge in the case, Pierre N. Leval, approved Mr. Burt's motion to force CBS to release the Benjamin report. Just before that approval, the chief lawyer for the network on the case, David Boies, let Mr. Burt know that CBS would never settle at a point when something embarrassing to it had just occurred.

"The only time to settle," Mr. Boies said to have told Mr. Burt, "is when

we want to avoid what's coming. We cannot settle when something bad has just come out, or it will look like that's why we settled."

In February 1984, in an extension of Mr. Gilpatric's effort, CBS proposed making a statement in which it said it continued to stand by the "accuracy and fairness" of the documentary but did not intend to question either General Westmoreland's patriotism or his "loyalty to this country or to the Presidents he served for so many years."

Mediator Is Appointed

The four-paragraph statement contained some language and ideas that were nearly identical to the joint statement agreed upon last week, but it was rejected. Mr. Burt, according to CBS legal sources, objected at that time to any reference by CBS that it supported the broadcast.

In the summer of 1984, Judge Leval, appointed a mediator to try to produce a settlement that might include a broadcast on CBS by General Westmoreland that would not be immediately rebutted by the network.

The mediator was Stephen E. Kaufman, former chief of the criminal division of the United States Attorney's office for the Southern District of New York. CBS and the general are believed to have been receptive to the idea of the program, but Mr. Burt continued to press for an apology and money.

"All that air time talk — all that khazera — wasn't worth doing," Mr. Burt said this week.

Bear "in a Pink Tutu"

Just before the trial started on Oct. 9 — and again around Thanksgiving, when Mr. Burt was saying publicly that a settlement was less likely than "a bear coming down Fifth Avenue in a pink tutu with a reefer" — he and CBS exchanged proposals for resolving the case. The network's statement again contained references to the general's loyalty, and CBS indicated that it might pay \$500,000 toward Mr. Burt's legal fees. But Mr. Burt was said to have demanded a seven-figure sum, perhaps as much as \$5 million.

"The insurmountable thing was a retraction or apology," a CBS lawyer said. "Money was never an issue with either side except as a symbol. But anything over a million — well it was all psychology, how it would be interpreted."

Before the Christmas recess, Mr. Burt and Mr. Boies met in a jury room. For the first time, Mr. Burt said he was prepared to settle without money.

Mr. Burt wanted CBS to say it had learned as a result of the case that General Westmoreland had "honestly and accurately" reported enemy troop strength in 1967 and, had this information been available in 1982, it would have been included in the broadcast. CBS refused the proposal.

During this period, Mr. Burt called Mr. Crile as a "hostile" witness — in effect, cross-examining him. And

many of the other lawyers for General Westmoreland thought that Mr. Burt, who had never in his career presented a case to a jury, had done poorly.

"Dan showed he had minus aptitude for cross and he got an enormous amount of flak," Mr. Schulman remembered. So David M. Dorsen, who had considerable litigating experience and had been involved in this case since 1982, took over the cross-examination of virtually all the CBS witnesses.

"You can't forget," Mr. Schulman said, "that Dan was the lawyer who offered to help Westmoreland when no one else would. But he had no idea what he was getting into with this case."

Last week — with CBS buoyed by its prospects on the "state of mind" if not the "truth" issue — Judge Leval informed the lawyers that Mr. Burt would have to prove his case by "clear and convincing" evidence, rather than the lesser standard of a "preponderance" of the evidence. In addition, the judge said, the jury would vote individually on "truth" and "state of mind" but, unlike the procedure used in the Sharon trial, would announce its decisions all at once.

'CBS Wins'

"Even if we lost on the truth issue," a CBS lawyer speculated, "the headline on the day of the verdict would read: 'CBS Wins'." Still, the lawyer said, Mr. Boies told Mr. Burt that he was amenable to "waiving" a jury verdict and letting the judge, who is required to make detailed findings that can be useful on appeal, decide the case. Mr. Burt declined.

On Feb. 13, soon after General McChristian's testimony and immediately following the start of the cross-examination of another former Westmoreland aide, Colonel Gain Hawkins — Mr. Burt called Mr. Vradenburg, the CBS general counsel, and asked to have breakfast.

When they met Friday morning, Mr. Burt told Mr. Vrandenburg that he was still interested in settling. After breakfast, he sent the CBS lawyer a suggested joint statement, handwritten on one page of a yellow legal pad, that resembled his proposal just before Christmas. He also promised, in effect, not to revive his pre-trial public attacks on CBS regarding the documentary. Mr. Vrandenburg consulted Mr. Boies, and around noon on Saturday, called Mr. Burt from his home in New Jersey.

Back to 1984 Offer

According to Mr. Burt, Mr. Vrandenburg said "you know, we aren't that far apart." But the CBS lawyer is said to have told Mr. Burt that his proposal was unacceptable. Mr. Vrandenburg went back to the statement CBS had offered in February 1984, modified it so that the phrase about CBS standing by the documentary would appear only in a separate statement by the network, and sent a copy to Mr. Burt at the Westbury, according to a CBS lawyer.

On Sunday, after some changes in which which the word "faithful" was inserted to describe General Westmoreland's service to his country and the word "distinguished" was used to describe CBS's journalistic tradition, senior CBS News officials saw the joint statement at Mr. Boies's law firm of Cravath, Swaine & Moore. They had originally planned the meeting that day to review what they would say when CBS won, or lost, the case. And now they were jubilant.

On the Westmoreland side, only one of the half-dozen lawyers, Anthony S. Murry, had been told in advance of the decision to settle.

'Anybody's Ball Game'

Mr. Dorsen, a former Federal prosecutor who is a partner in the Washington law firm of Sachs, Greenebaum & Taylor, learned that an agreement was soon to be announced when a reporter, on Sunday night, called his room at the Harley Hotel, where he was preparing for court. Mr. Dorsen was furious at both the withdrawal from the case and his treatment by Mr. Burt.

"I felt we still had a shot at winning," Mr. Dorsen said in an interview later, "and that it was anybody's ball game."

George S. Leisure Jr., a senior partner of Donovan, Leisure, Newton & Irvine, learned that the case was being settled when he picked up a newspaper on Monday morning.

"I was stunned; I'm still stunned," Mr. Leisure said in an interview this week. "After all we put into this case — the General and I had become fairly close — it was a blow to learn this way. I almost fainted."

Mr. Leisure, whose firm provided legal assistance and office space for Mr. Burt, said he did not know why the settlement had come when it did or the "the thinking, the reasoning behind" it. "I'm not going to second guess Dan Burt," he said. "Had I been involved, I might have come to the same conclusion. I don't know."

A Call at 8 A.M.

General Westmoreland, who was aware as early as Saturday morning that an agreement was under discussion, was in Garrison, N.Y. on Sunday morning, staying with friends from his days as Superintendent of the United States Military Academy at nearby West Point. Mr. Burt called at 8 A.M., but General Westmoreland was asleep and his wife did not want to wake him. Mr. Burt called again at 9 A.M., and read his client the joint statement.

"I listened to it, and I thought it made sense," the general recalled last week. "I know the historians can deal with a case like this but a jury — well it could have been happenstance, a flip of the coin. I had to decide whether to fight or compromise. Now, I've made a lot of decisions in my life. You weigh them. You make them. And you forget them."